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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON,
JOINT SCHOOL DISTRICT No. 8,
CITY OF MADISON,
VILLAGES OF MAPLE BLUFF AND
SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG AND BURKE
AND ITS AGENT THE BOARD OF EDUCATION,
CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,
Appellants

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION and
MADISON TEACHERS INCORPORATED,
Appellees

BRIEF OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

On appeal from the Wisconsin Supreme Court decision entered
on June 30, 1975 (69 Wis. 2d 200, 231 N.W. 2d 206)

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On appeal from the Wisconsin Supreme Court decision entered
on June 30, 1975 (69 Wis. 2d 200, 231 N.W. 2d 206)

This brief *amicus* in support of Appellants is filed by the Wisconsin Association of School Boards, Inc., with the written and filed consent of the parties as provided in Rule 42.2 of the Rules of this Court.

INTEREST OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC.

The Wisconsin Association of School Boards, Inc. (WASB) is a voluntary non-stock membership corporation, authorized and organized under Chapter 181 of the Wisconsin Statutes. Of the 436 public school boards in the State of Wisconsin, some 430 boards belong to the WASB. The stated purposes of the WASB as set forth in its Articles of Incorporation and Bylaws, are to aid and assist public school boards and public school agencies of the State of Wisconsin in performing their lawful function, primarily through meetings, communications and dissemination of information, and to promote, support and advance the interest of public education in Wisconsin.

The decision of the Wisconsin Supreme Court challenged here is that an individual school district employee can, consistent with the First Amendment to the U.S. Constitution, be precluded from appearing and speaking at a public meeting of the board of education of that school district, during a portion of that meeting set aside for public appearances, on those matters which are subject to collective bargaining between the board of education and an organization representing employees for purposes of collective bargaining. WASB sees in that decision not only an unjustified infringement of the fundamental rights of public employees guaranteed by the First Amendment to the U.S. Constitution, but a serious threat to thorough and efficient governmental operation of public school districts, since it unnecessarily restricts the access of that body, charged with important policy making functions in the operation and management of public schools, to sources of information essential to its function.

WASB recognizes the exclusive right of the collective bargaining representative to negotiate with a public employer on wages, hours, and conditions of employment under s. 111.70, Wis. Stats., and concurs in appellant's concession that speech or petitioning in the form of bargaining or negotiating for a labor agreement can constitutionally be restricted to the exclusive representative of the bargaining unit. However, WASB believes that it is not necessary in order to preserve the exclusive status of the collective bargaining representative that public school employees be wholly precluded from speaking to their governmental employer on any matters of concern to them or to the operation of the schools if such concerns pertain to any matter subject to collective bargaining, or that public school employer be precluded from listening to these concerns. Public employees should not, and constitutionally cannot, be denied the opportunity to speak and present a petition to a duly elected board of education on a matter subject to collective bargaining at a regular school board meeting during the portion of that meeting devoted to public appearances. Public school boards must, within the limits of their proscribed procedures, be allowed to hear in public meetings comments, suggestions or reports from all persons, including its employees, even on these matters which relate to wages, hours and conditions of employment.

SUMMARY OF ARGUMENT

Under s. 111.70, as interpreted by the Wisconsin Supreme Court, a school board cannot permit a municipal employee to appear before and address the board at a public meeting, during a portion thereof devoted to public

appearances, on a matter subject to collective bargaining, because listening to an employee speak on such subjects constitutes negotiating and, therefore, interferes with the right of municipal employees to bargain collectively through representatives of their own choosing and violates the duty of the board, as employer, to bargain with the exclusive representative of employees in a bargaining unit. The statute as interpreted infringes upon the First Amendment rights of thousands of public employees in the State of Wisconsin because it prohibits them from petitioning their government on matters of concern to them as employees and individual citizens, and, because it prohibits speech directed to government, has the harmful effect of depriving governmental bodies of access to information on matters having a substantial impact on government services.

First Amendment rights are not absolute and speech can be circumscribed when used as an integral part of conduct which violates a valid state statute. However, states cannot foreclose the exercise of constitutional rights by mere labels. While speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to the exclusive representative of a bargaining unit, a state cannot, consistent with the First and Fourteenth Amendments to the U.S. Constitution, prohibit a governmental body from merely receiving a petition or listening to its employee speak on a matter subject to collective bargaining, at a public meeting, by labeling such activity "negotiating." Merely listening by a public governmental body to an employee's petition on a matter which may be subject to bargaining is not in derogation of the rights of public employees to bargain collectively

through representatives of their own choosing, and causes no significant threat of harm to the exclusive right of the bargaining representative or to the state's valid interest in labor relations.

Public employees have a substantial interest in addressing their employer on matters subject to bargaining. This is particularly true in those instances where the employee's individual goal and the union's institutional goals are at odds, where the subject is one having a fundamental personal bearing on the employee as an individual, and where the subject has ramifications with respect to the extent and quality of services performed by the government of employment.

Decisions on wages, hours and conditions of employment have a profound effect on the operation of the public schools, and unnecessary restrictions on the school boards' access to information on such subjects can substantially impair effective governmental decision making. Regardless of the merits of this particular case, the order of the WERC, which absolutely prohibits a school board from permitting any employee, who is not the collective bargaining representative, to speak at a public meeting of the board on matters subject to collective bargaining, precludes the board from receiving information concerning the performance of its governmental function from sources most appropriately positioned to give it.

ARGUMENT

I.

Section 111.70 Wis. Stats., As Interpreted By The Decision In The Wisconsin Supreme Court Effectively Denies Municipal Employees In The State Of Wisconsin The Right Of Addressing Their Government On Subjects Which May Have A Direct Bearing On Them As Well As A Direct Impact On The Services Performed By Government

Section 111.70, the Municipal Employment Relations Act (MERA), secures to municipal employees in the State of Wisconsin the right of self-organization, including the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purpose of collective bargaining, or other mutual aid or protection. Such employees also have the right to refrain from any and all such activities except the requirement of paying dues in the manner provided in a fair-share agreement. s. 111.70 (2), Wis. Stats. MERA makes it a prohibited practice for a municipal employer in Wisconsin to interfere with, restrain or coerce municipal employees in the exercise of these rights (s. 111.70 (3) (a) 1., Wis. Stats.), or to refuse to bargain collectively with the representative of the majority of employees in an appropriate bargaining unit (s. 111.70 (3) (a) 4., Wis. Stats.). The Wisconsin Employment Relations Commission (WERC) is charged

with duty of preventing prohibited practices, including the duty of entering a remedial order when a prohibited practice is found to have occurred. ss. 111.70 (4) (a), 111.07 (4).

While engaged in negotiating for a collective bargaining agreement with the Madison Teachers Incorporated (hereinafter MTI), the exclusive bargaining representative for the Madison school district teachers, the Madison Board of Education (hereinafter board) permitted a teacher employed by the district to appear before, and address and present a written petition to the board opposing inclusion of a "fair-share", i.e., mandatory union dues deduction, agreement (s. 111.70 (1) (h), Wis. Stats.) in the collective bargaining agreement then being negotiated. This occurred at a regular public meeting of the board, at a portion of that meeting devoted to public appearances. The board listened as the employee addressed the board and read the contents of a petition. However, no exchange took place between the employee and any member of the board other than a question following the employee's presentation whether he intended to communicate the written petition to the board, and the reply by the employee that he did.

A complaint was thereafter filed by MTI with the WERC alleging that by listening to one of its employees speak at a public meeting on a matter subject to negotiations, the board had negotiated with other than the exclusive collective bargaining representative and thereby violated MERA. Following a hearing, the WERC held that the board, in allowing the employee to speak and in listening to his statement and an oral presentation of his petition, had committed a prohibited labor practice by

violating its duty to bargain in good faith with the exclusive bargaining representative and by interfering with the rights of employees represented by MTI to bargain collectively through a representative of their own choosing. The WERC ordered that the board "immediately cease and desist from permitting employees, other than representatives of Madison Teachers, Inc. to appear and speak at meetings of the Board of Education on matters subject to collective bargaining between it and Madison Teachers, Inc." The WERC decision and order were affirmed by judgment of the circuit court, and the Wisconsin Supreme Court affirmed the judgment of the circuit court.

The Wisconsin Supreme Court held that under MERA the organization chosen for purposes of collective bargaining in a particular bargaining unit is not only the bargaining representative for members of that organization, but is the exclusive bargaining representative for all employees of the bargaining unit whether or not they are members of that organization. *Madison Joint School Dist. No. 8 v. WERC*, 69 Wis. 2d 200, 200, 231 N.W. 2d 206. The court held that speech in the form of bargaining or negotiating can constitutionally be restricted to the representative of the majority organization because it is "justified by the necessity to avoid the dangers attendant upon relative chaos in labor management relation." (*Madison*, supra, at 212); and further, that permitting an employee to speak at a public meeting of the board on a matter subject to collective bargaining constitutes bargaining and can, therefore, likewise be restricted to the representative of the majority organization without infringement of First Amendment

rights. The Supreme Court also held that the order of the WERC which prohibited the board from permitting any employee to appear and speak at meetings of the board on matters subject to collective bargaining was not unconstitutionally vague, and that the board lacked standing to raise the issue because the matter on which the employee was permitted to speak was admittedly a matter subject to negotiations and the board could not, therefore, challenge the WERC's order for vagueness. (*Madison*, supra, at 215, 216).

Section 111.70 as interpreted by the Wisconsin Supreme Court, thus prohibits municipal employees in Wisconsin from appearing before and speaking at regular meetings of their government employer on subjects that have a fundamental personal bearing on them as employees and as individual citizens, and thereby infringes upon their rights of free speech and to petition their government for a redress of grievances guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. The infringement of rights extends to thousands of individuals in Wisconsin, and, if upheld by this court, has the potential of impairing the rights of several million individuals throughout the country.

In October, 1973, there were 203,662 full-time equivalent employees of state and local units of government in Wisconsin. Of this number, 51,583 represented state employees, and 152,079 represented employees of local units of government, including 57, 223 municipal (city and village) employees, 56,500 school district employees, 33,209 county employees, 4,582 town employees and 565 employees of special districts. At the same time there were 9,577,922 full-time equivalent

employees of state and local units of government nationwide. This figure represents 2,546,728 full-time equivalent state employees and 7,031,264 full-time equivalent employees of local units of government.[1]

As of October, 1972, of the 8.6 million full-time equivalent employees of state and local units of government nationwide, 4.3 million, or 50.4% belonged to employee organizations. School district employees demonstrated the greatest degree of organization with 62% of all full-time employees organized. Nearly 70% of all full-time teachers (who accounted for almost one-third of all full-time employees of state and local units of government) were organized in October, 1972. Of the 78,268 state and local units of government in this country in October, 1972, 10,737, or 13.7% of these governments engaged in collective negotiations or meet and confer discussions. In Wisconsin at that time, 19.5% of the state and local units of government (477 out of 2,448) engaged in collective negotiations. Of the 417 school districts identified in October, 1972, 322 of 77.2% engaged in collective negotiations.[2]

The WERC decision which was upheld by the Wisconsin Supreme Court thus precludes or has the potential for precluding thousands of citizens of the State of Wisconsin from the full exercise of their First Amendment rights. A decision by this Court upholding the

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[1]U.S. Bureau of the Census; Public Employment in 1973.

[2]U.S. Bureau of Census, 1972 Census of Governments, Public Employment, Management-Labor Relations in State and Local Governments.

Wisconsin Supreme Court decision similarly has the potential for precluding several million public employees nationwide of the full exercise of their First Amendment rights.[3]

Equally significant is the impact or potential impact of such a decision on state and local units of government in Wisconsin and throughout the nation. The decision has the harmful, or potentially harmful effect of depriving bodies politic of access to information from a large group of citizens who not only have a substantial personal stake in the decisions made by these bodies, but, as a class, are the members of a community most likely to have an informed and definite opinion on matters within the competence of these bodies.

Amicus believes that in light of the need of governmental bodies to have access to all possible sources of information, the state's interest in union security and union exclusivity must yield to the state's more fundamental interest in good government. Information provided governmental bodies on matters subject to collective bargaining at the bargaining table, or through other union procedures, is an inadequate substitute for information that can be provided by public employees.

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[3]Employees in the federal civil service have a statutory right to petition Congress and Members of Congress. "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." (5 U.S.C. s. 7102) See: Comment, Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5 U.S.C. Section 652 (d), 74 *Yale L. J.* 1156 (1965); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 *Va. L. Rev.* 885 (1971).

Matters subject to collective bargaining not only have a direct bearing on public employees but a direct or indirect impact on the services performed by government. Public employees, as well as all other persons, must have the right of access to governmental bodies, within the limits of their proscribed procedures, even on matters relating to wages, hours and working conditions, not only because of their personal stake in such access, but because public bodies must depend on this information for the decisions they are required to make.

II.

The First And Fourteenth Amendments To The U.S. Constitution Protect The Right Of Public Employees To Appear Before And Address A Governmental Body Even On Matters That Are Subject To Collective Bargaining

A. A law which infringes on the constitutionally protected rights of free speech and peaceable assembly and the right to petition for a redress of grievances cannot be sustained merely because it was enacted for the purpose of dealing with some evil within the state's legislative competence. A state cannot foreclose the exercise of constitutional rights under the First Amendment by mere labels.

It is well established that First Amendment rights are not absolute and may be circumscribed to further a sufficiently strong public interest. The First Amendment does not imply that states are without power to translate into law local policies to promote health, safety, morals and welfare (*Carpenters and Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 726, 62 S.Ct. 807), and a state "may regulate labor relations with the view toward protecting the public interests" (*Thomas v. Collins*, 323 U.S. 516, 532,

65 S.Ct. 315). First Amendment rights are not immunized from regulation when used as an integral part of conduct that violates a valid statute, and such rights may not be used as a means or pretext for achieving substantive evils which the legislature has the power to control. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 69 S.Ct. 684; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609.

However, all restrictions on First Amendment rights are not valid merely because the state has enacted a law dealing with some evil within the state's legislative competence. *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 88 S.Ct. 353. First Amendment rights may be circumscribed only when necessary to further a sufficiently strong public interest, and any significant restriction on such rights carries with it a heavy burden of justification. *Greer v. Spock*, U.S. , 96 S.Ct. 1211, 1219, 1220 (Mr. Justice Powell, concurring). The preferred place given First Amendment rights give such rights a sanctity not permitting dubious intrusions. Thus any attempt to restrict free speech, assembly and petition must be justified by a clear public interest threatened not doubtfully or remotely but by a clear and present danger. *Thomas*, supra, at 530.

A state may not under the guise of prohibiting misconduct ignore constitutional rights under the First Amendment and cannot foreclose the exercise of such rights by mere labels. *NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328. Laws which actually affect the exercise of such vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because

the laws do in fact provide a helpful means of dealing with an evil. *United Mine Workers*, supra, at 222. It is imperative that courts weigh the circumstances and appraise the substantiality of reasons advanced in support of challenged regulations. *Thornhill v. Alabama*, 310 U.S. 88, 96, 60 S.Ct. 736. Where the line should be drawn rests not on generalities but on a concrete clash of particular interest. *Thomas*, supra, at 531.

B. It is not necessary in order to preserve the exclusive status of the bargaining representative, that the right of public employees to appear before and address a governmental body on subjects related to wages, hours and working conditions be restricted.

Amicus concurs in appellant's concession that speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to the exclusive representative of a bargaining unit. However, the state, in regulating labor relations, cannot constitutionally prohibit public employees from addressing and petitioning their employing governmental body at a public meeting of that body even on matters subject to bargaining. Nor can a state, in regulating labor relations, prohibit a governmental employer from listening to and receiving petitions from its employees at a public meeting merely by labeling such activity "negotiating."

While the First Amendment cannot be used as a cover to indulge in conduct which in fact interferes with the

rights of municipal employees to bargain collectively through representatives of their own choosing (s. 111.70 (3) (a) 1, Wis. Stats.), or in fact amounts to a refusal to bargain collectively with a representative of the majority of its employees (s. 111.70 (3) (a) 4, Wis. Stats.), this is not the case where a public employee addresses and petitions a governmental employer, and the employer merely listens to that employee, at a public meeting of that governmental body. "What the group, selected as sole bargaining agent in the election to select such representative, won was the right to represent employees in the bargaining unit in bargaining sessions and negotiations with the employer. What it did not win was the right to speak during a public discussion period at a public meeting or a public body with all other voices of individual teachers or groups of teachers to be silenced." *Madison,* supra, at 220 (Justice Robert W. Hanson dissenting). Conversely, what the employees lost when they delegated to their representative the right to bargain with their governmental employer was the right to meet and confer with that employer with respect to wages, hours and working conditions with the intention of reaching an agreement. However, governmental employees cannot constitutionally be required to delegate the rights of free speech, assembly and petition to their collective bargaining representative in those instances where it is not necessary to serve the function of collective bargaining. Cf. *Skayd v. Ringling Rock Lodge No. 665, Brotherhood of Railroad Trainmen of Pottstown,* 113 A. 70, 270 Pa. 67; *Harrison v. Brotherhood of Railroad Clerks,* (Ky.) 271 S.W. 2d 852. Collective bargaining can limit economic freedom, but it cannot limit the free exchange of information.

Public employees have a substantial interest in addressing their governmental employer on matters which are subject to collective bargaining. These are matters which have a direct effect on them personally as employees and as citizens. The interest of public employees in addressing their governmental employer is particularly important in those instances where a union's institutional goals and an employee's individual goals may not coincide (e.g. union security provisions), where a subject is one having a fundamental personal bearing on the employee as an individual,[4] and where the subject has ramifications on the extent and quality of services performed by the government of employment.

The necessity of exclusivity in bargaining relationships does not include the need to silence employees in a public forum. Permitting a public employee to speak before a governmental body is not in derogation of the union's exclusive right to bargain where all the employer does is listen. Merely listening does not undermine the statutory right of the union to bargain, or of employees to bargain through representatives of their own choosing. Listening involves no direct dealing with individual employees or bypassing of the collective bargaining representative. Any danger of chaos in labor relations from such activity is dubious at best. Nor can any interest in preserving the collective clout of public employees justify an invasion of First Amendment rights, for "the concept that government may restrict the speech

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[4]e.g. the WERC has determined that a requirement that public employees live within the municipality of employment is a mandatory subject of bargaining. *City of Brookfield* (11406-A, B) (Aff. Waukesha Co. Cir. Ct. No. 31923).

of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources.'" *Buckley v. Valeo,* U.S. ,96 S.Ct. 612, 649.

The fact that such speech is intended to or may have the effect of inducing action by the governmental employer in opposition to the action desired by the bargaining representative does not justify an invasion of First Amendment rights merely because the speaker is an employee of the governmental unit, for every expression of opinion on matters that are important has at least the potentiality of inducing action in the interest of one rather than another group in our society. *Thornhill,* supra, at 104. The right of free speech, assembly and petition is not intended to protect merely the right to describe facts. It includes the opportunity to persuade to action, and even vigorous advocacy of lawful ends against government intrusion. *Button,* supra, at 429.

In summary, *Amicus* submits that since matters subject to collective bargaining have a direct impact on them, public employees have an important stake in addressing their government employer on these subjects. Permitting public employees to speak on subjects of bargaining at a public meeting of a governmental body does not invade the exclusivity of the bargaining relationship. Such speech causes no significant harm to the right of municipal employees to bargain collectively through representatives of their own choosing or to the state's valid interest in regulating labor relations.

C. State labor policy must yield to First Amendment rights where the exercise of such rights is necessary to preserve the informed operation of government.

This court has held that the nature of the forum and conflicting interests are important in determining the degree of protection afforded by the First Amendment to the speech in question. *Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714. Where the forum for expression of First Amendment rights is a meeting of a governmental body there exists a First Amendment forum of the highest order. The decision in this case not only infringes on free speech but speech directed to a governmental body. Abridgement of free speech in this context not only impairs opportunities for public education, but impairs well informed decision making by elected public officials. Surely any public interest in regulating labor relations must yield when such regulations restrict the right of individuals to address their government and thereby impair the access of governmental officials to information necessary to their decision making process.

This court has jealously guarded the right of individuals to petition government since it not only preserves the right of people to make their wishes known to their governmental representatives, but also insures access of government to information upon which decisions are to be made. In *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, this court was called upon to consider whether the Sherman Act's prohibition on combinations in

restraint of trade was applicable to activities which included solicitation of government action with respect to passage and enforcement of laws. The court construed the Sherman Act so as not to apply to such activities because such a construction "would raise important constitutional questions" and the court was unwilling to impute to Congress an intent to invade the right to petition secured by the First Amendment or "to regulate political rather than business activities." *Noerr*, supra, at 137, 138. The court held that a decision restricting solicitation of government action would impair the representative nature of government. "In a representative democracy such as this, these branches of government (legislative and executive) act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." (*Noerr*, supra, at 137). A holding that political activity can be regulated would amount to a holding "that the government retains the power to act in a representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes..." *Noerr*, supra, at 137. The court further held that even though influencing legislation may be directed toward an unlawful purpose, this does not justify a restriction on a right to petition, because:

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring an advantage to themselves and a disadvantage to their competitors.... Indeed it is quite probably people with such a hope of personal advantage *who provide much of the information upon which governments must act.* A construction ... that would disqualify people from taking a public position on matters in which they are financially interested *would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."* (emphasis added) *Noerr*, supra, at 137.

The court stated that it is only where an attempt to influence legislation is a "mere sham" to cover up what is actually nothing more than an attempt to engage directly in an unlawful practice that these important interests might be overcome. *Noerr*, supra, at 144.[5]

The basis of the right to petition is a democracy's interest in governmental responsiveness to the electorate and in government access to as many sources of information as possible. To the extent that a governmental body cannot listen to its employees, these important interests are diminished. Political bodies should not be precluded from hearing from their employees on the basis of legislatively imposed representation for bargaining purposes. Surely there is no abuse of the rights of others or "mere sham" with a goal toward undermining the exclusive representative for purposes of collective

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[5]Cf. *California Motor Transport Company v. Trucking Unlimited*, supra, where the court held that concerted activity, by action in state and federal administrative and judicial proceedings, in violation of the Clayton Act, may not be constitutionally protected where such activity is found to be a sham because the use of such forums is without probable cause and regardless of the merits and for the purpose of barring competitors from meaningful use of the same forums.

bargaining where a governmental employer merely listens to the petition of its employees on matters subject to collective bargaining.

It is just as important for government employees to speak and for governmental employers to have access to information where wages, hours and working conditions are involved as on any other matter. From the employee's standpoint, as discussed above, wages, hours and working conditions have a direct bearing on them. The governmental employer has an interest in employee's views on these subjects since it is these employees who carry out the governmental function of the employer. Moreover, many decisions relating to wages, hours and working conditions have a direct or indirect impact on governmental operations beyond that which directly affects employees. "Everything a teachers' union does affects the quality of education, and the cross-over from straight bread-and-butter concerns to the nature of the educational system is profound." A. H. Raskin, Politics Up-Ends the Bargaining Table, *Public Workers and Public Unions*, p. 142 (Sam Zagoria ed.) Prentice-Hall 1972.

In this respect it must be remembered that a school board is more than an employer. It is a body politic, the members of which are elected by the citizenry and charged with the important function of educating the community's children. Decisions made by this body involve sensitive political, social and idealogical questions and the need for responsive and enlightened decision making is great. Teachers, too, are more than employees. They are professionals in the field of education. To absolutely preclude these employees from addressing the merits of various bargaining proposals as they affect educational

quality would preclude school boards from having access to information which goes to the heart of their function. Union input on such matters is insufficient. "Teachers are, as a class, the members of a community most likely to have informed and definite opinions" on such matters. *Pickering v. Board of Education*, 391 U.S. 563, 572, 88 S.Ct. 1731 (1968). A holding that a body politic may not receive information relating to wages, hours and working conditions from its employees substantially impairs governmental access to necessary information and, therefore, impairs the power of government to act.

The WERC in two "declaratory rulings"[6] has determined the scope of subjects upon which public school boards are required to bargain collectively with the representative of school employees.[7] The WERC interpreted MERA as requiring an accommodation between the existing school statutes and the provisions of MERA, and also as recognizing that certain matters are

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[6]Sec. 111.70 (4) (b), Wis. Stats.

[7]Collective bargaining is defined in MERA as follows: "Collective bargaining means the performance of the mutual obligation of the employer ... and the representatives of its employees, to meet and confer at reasonable times, in good faith with respect to wages, hours and conditions of employment with the intention of reaching an agreement.... The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and duties to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured public employees by the constitutions of this state and of the United States and by this subchapter." s. 111.70 (1) (d), Wis. Stats.

reserved to management. The WERC therefore held that there is a *mandatory* duty to bargain collectively on matters relating to the duties and responsibilities delegated to and required of school boards by statute, which do not concern basic educational policy and which primarily affect wages, hours and conditions of employment; but that matters which do concern basic educational policy but by their impact secondarily affect wages, hours and conditions of employment are subject to mandatory bargaining only with respect to the impact of such matters on wages, hours and conditions of employment. The WERC also held, however, that subjects designated non-mandatory subjects of bargaining are *permissibly* bargainable and defined permissive subjects as "those that may be proposed and regarding which bargaining may occur even to final agreement; but upon which the proposing party may not insist to the point of bringing the entire negotiations to an impasse." The WERC has thus determined, that subjects such as the school calendar, just cause for discipline or dismissal, layoff of teachers, access of teachers to their files and records, and some aspects of supervision and evaluation of teachers are mandatorily negotiable, and that matters such as class size, contact hours, reading programs, summer programs, curriculum, pilot programs for emotionally disturbed students, in-service programs for teachers, as well as proposals relating to methods of dealing with "problem students" are permissively negotiable.[8]

/[8] *City of Beloit*, No. 11831-C, aff. Dane Co. Cir. Ct. Nos. 144-272, 144-406 (appeal to Wisconsin Supreme Court pending); *Oak Creek-Franklin Joint City School District No. 1*, No. 11827-D, aff. Dane Co. Cir. Ct., Case No. 144-473.

Statutes, as well as agency and court interpretations of such statutes, concerning the scope of collective bargaining vary widely among states. The scope of bargaining in any given state is subject to expansion or restriction by action of the state legislature. Moreover, "realistically no legal walls are going to keep public employee unions from moving increasingly into the policy field ... Manpower is so much a bedrock of all municipal services that public unions will find ways to tie considerations of job security or working conditions into every policy issue they want to have a voice in." *Raskin*, supra, at 143.

The order of the WERC broadly prohibits the school board from permitting an employee to speak on "matters subject to collective bargaining" and is, in this respect, unconstitutionally vague and overbroad. The order acts as a prior restraint of pure speech directed to a governmental body on matters which are of a legitimate concern to that body. Not only is the phrase "matters subject to collective bargaining" vague in that it is constantly subject to interpretation by the courts; it is also overbroad in the sense that, even if its definition were clearly understood, information would be kept from the board by virtue of the order, that is necessary or useful to its government function from sources most appropriately positioned to give it. The right to receive information in this respect is not sufficiently offset by any compelling state interest, regardless of the merits of this particular case.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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